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PEN v KAL & Anor

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS
NO WA-34-7-06 OF 2021
EVROL MARIETTE PETERS J
4 OCTOBER 2022

C *Family Law — Children — Adoption — Whether application by non-Muslim*
woman to adopt Muslim boy under Adoption Act 1952 (‘the AA’) could not be
allowed as the AA did not apply to Muslims — Whether even if the AA applied,
applicant had failed to show that boy’s mother had consented to the adoption
D *— Whether onus was on applicant to show why the consent could not be obtained*
and, if necessary, to apply to court for dispensation of the consent — Adoption Act
1952 ss 5 & 12

E The applicant (‘PEN’), a 57-year-old widow who had seven children of her
own, filed the instant application to adopt the first respondent (‘KAL’)
pursuant to the Adoption Act 1952 (‘the AA’). At the time the application was
filed, KAL was six months short of his 19th birthday. KAL was born to PEN’s
Indonesian domestic helper who, according to PEN, went missing shortly after
KAL’s birth and was never heard from since. KEN contended that she and her
late husband raised KAL since he was a month old according to Chinese
F culture, customs and traditions. The second respondent opposed the adoption
application on the ground that KAL was a Muslim — as evidenced in his birth
certificate — and that, accordingly, the AA did not apply to him.

Held, dismissing the adoption application:

- G (1) PEN’s contention that KAL was raised in the Chinese tradition and
culture did not detract from the fact that KAL was a Muslim. There was
no reason to dispute the veracity of KAL’s birth certificate that was
tendered in evidence by his guardian ad litem. In any event, since it was
H not disputed that KAL’s mother was a Muslim, it could not be doubted
that KAL’s religion followed his mother’s. The Adoption Act 1952
therefore did not apply to KAL. On that basis alone, the adoption
application had to be dismissed (see paras 11 & 14–16).
- I (2) Even if the Adoption Act 1952 applied in the instant case, PEN had not
complied with s 12 thereof which required KAL’s mother’s consent to the
adoption. That consent was never obtained nor was it dispensed with by
the court. PEN should have obtained the dispensation of consent prior to
the filing the adoption application. Such consent was an important factor
in adoption applications as was obvious from a reading of s 6 of the

Adoption Act as well as r 7 of the Adoption Rules 1955 and Form 2 of the First Schedule to the said Rules (see paras 19–20, 22 & 27).

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- (3) The burden was upon PEN to convince the court that she had made all reasonable efforts to locate KAL's mother and that it was justified for the mother's consent to be dispensed with. If KAL was abandoned shortly after his birth, which was about 20 years ago, it begged the question why PEN was only filing the adoption application now and then claiming that she could not locate KAL's mother. PEN did not adduce any evidence to convince the court that she had made any effort to locate KAL's mother. She had merely stated that she did not know where the mother was (see paras 30–31).

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[Bahasa Malaysia summary]

Pemohon ('PEN'), seorang balu berusia 57 tahun yang mempunyai tujuh orang anak, memfailkan permohonan semasa untuk mengambil responden pertama ('KAL') sebagai anak angkat menurut Akta Pendaftaran Pengangkatan 1952 ('APP'). Pada masa permohonan tersebut difailkan, KAL kurang enam bulan daripada hari lahirnya yang ke-19. KAL dilahirkan oleh pembantu rumah warga Indonesia PEN yang, menurut PEN, hilang sejurus selepas kelahiran KAL dan tidak pernah didengari sejak itu. KEN berhujah bahawa beliau dan arwah suaminya membesarkan KAL sejak berusia sebulan mengikut budaya, adat dan tradisi Cina. Responden kedua menentang permohonan pendaftaran pengangkatan atas alasan bahawa KAL adalah seorang Muslim — seperti yang dibuktikan dalam sijil kelahirannya — dan oleh itu, APP tidak terpakai kepadanya.

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Diputuskan, menolak permohonan pendaftaran pengangkatan:

- (1) Pendapat PEN bahawa KAL dibesarkan dalam tradisi dan budaya Cina tidak menjejaskan hakikat bahawa KAL adalah seorang Muslim. Tidak ada sebab untuk mempertikaikan kebenaran sijil kelahiran KAL yang dikemukakan sebagai keterangan oleh penjaga ad litemnya. Walau apa pun, oleh sebab ia tidak dipertikaikan bahawa ibu KAL adalah seorang Muslim, maka tidak dapat dinafikan bahawa agama KAL mengikut ibunya. Oleh itu, Akta Pendaftaran Pengangkatan 1952 tidak terpakai kepada KAL. Atas dasar itu sahaja, permohonan pendaftaran pengangkatan harus ditolak (lihat perenggan 11 & 14–16).
- (2) Walaupun Akta Pendaftaran Pengangkatan 1952 terpakai dalam kes semasa, PEN tidak mematuhi s 12 yang memerlukan persetujuan ibu KAL untuk pengangkatan. Persetujuan tersebut tidak pernah diperolehi dan tidak pula diketepikan oleh mahkamah. PEN sepatutnya telah mendapatkan dispensasi persetujuan sebelum memfailkan permohonan anak angkat. Persetujuan tersebut merupakan faktor penting dalam permohonan pengangkatan seperti yang jelas daripada bacaan s 6 Akta

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- A** Pendaftaran Pengangkatan serta k 7 Kaedah-Kaedah Pengangkatan 1955 dan Borang 2 Jadual Pertama kepada Peraturan tersebut (lihat perenggan 19–20, 22 & 27).
- B** (3) Beban terletak pada PEN untuk meyakinkan mahkamah bahawa beliau telah melakukan segala usaha yang munasabah untuk mencari ibu KAL dan bahawa ianya adalah wajar untuk persetujuan ibu diketepikan. Jika KAL ditinggalkan sejurus selepas kelahirannya, iaitu kira-kira 20 tahun lalu, ia menimbulkan persoalan mengapa PEN hanya memfailkan permohonan anak angkat sekarang dan kemudiannya mendakwa beliau tidak dapat mengesan ibu KAL. PEN tidak mengemukakan sebarang keterangan untuk meyakinkan mahkamah bahawa beliau telah berusaha untuk mengesan ibu KAL. Beliau hanya menyatakan bahawa beliau tidak tahu di mana ibu berada (lihat perenggan 30–31).]
- C**
- D** **Cases referred to**
Baby M (an infant) (adoption: consent), Re [1994] 2 MLJ 635, HC (folld)
Sean O' Casey Patterson v Chan Hoong Poh & Ors [2010] 3 MLJ 733, CA (refd)
TPC v ABU & Anor [1983] 2 MLJ 79 (folld)
- E** **Legislation referred to**
 Adoption Act 1952 ss 5, 6, 12, 12(2), 13, 31
 Adoption Rules 1955 r 7, First Schedule, Form 2
- F** *Weera Premananda (with Pook Fong Fee) (Ahmad Deniel, Ruben & Co) for the applicant and first respondent.*
Rubini Pubalan (with Sharifah Nur Amirah and Umami Nurul Farahin bt Kamaruddin) (Federal Counsel and Guardian Ad Litem) (Federal Territory Department of Social Welfare) for the second respondent.
- G** **Evrol Mariette Peters J:**
 INTRODUCTION
- H** [1] This was an application ('this application') by the applicant to adopt the first respondent pursuant to the Adoption Act 1952 ('the Adoption Act').
- [2] In the interest of privacy and considering the sensitivity of the issues in these proceedings, the applicant and first respondent have been anonymised in this judgment respectively as PEN and KAL.
- I** THE FACTUAL BACKGROUND
- [3] The applicant, a 57-year old trader, is a widow who has seven children of her own. The first respondent, who was born in December 2002, was raised by

the applicant and her late husband, ever since the first respondent was one month old.

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[4] The applicant claimed that the first respondent was the illegitimate child of her Indonesian domestic help, who had gone missing 20 years ago, shortly after the first respondent was born, and has never been heard of since.

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[5] In June 2021, this application was filed, which was dismissed for the following reasons.

CONTENTIONS, EVALUATION, AND FINDINGS

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Whether the Adoption Act 1952 applied

[6] The second respondent resisted this application on the basis that the first respondent is a Muslim and as such, the Adoption Act had no application in the present case.

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[7] The starting point to this application, therefore, was the issue of whether the Adoption Act even applied to the first respondent, bearing in mind s 31 of the Adoption Act, which reads:

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Section 31 — Act not to apply to Muslims.

This Act shall not apply to any person who professes the religion of Islam either so as to permit the adoption of any child by such a person or so as to permit the adoption by any person of a child who according to the law of the religion of Islam is a Muslim. (Emphasis added.)

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[8] Both the applicant and second respondent had adduced copies of the birth certificate of the first respondent, with the applicant's copy indicating that there was no religion whatsoever that was documented for the first respondent, whilst the second respondent's copy indicated that the first respondent is a Muslim. The applicant, in tenaciously disputing the second respondent's copy of the first respondent's birth certificate, contended that the first respondent is and never was a Muslim, as he was raised according to Chinese culture and tradition since his birth.

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[9] The applicant proceeded to submit that the second respondent had not responded to the affidavits in reply by the applicant and the first respondent, and an additional affidavit by one Mohamad Fazhly bin Johari ('Mohamad Fazhly'), who claimed to be a family friend, and as such, was deemed to have admitted to their contents.

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- A [10] The affidavits of the applicant and Mohamad Fazhly were affirmed on 28 October 2021, whilst the first respondent's affidavit was dated 29 October 2021 ('the three affidavits'). In all three affidavits, it was claimed that the first respondent was abandoned by his mother and that he was raised by the applicant in the Chinese tradition and culture. In the affidavit affirmed by B Mohamad Fazhly, he deposed that the first respondent had never observed the Muslim religion.

- C [11] After perusing the three affidavits, it was my view that the contents of the same were repetitious as the applicant had already deposed these facts in her affidavit in support, affirmed on 31 May 2021. Furthermore, the fact that the applicant had raised the first respondent in the Chinese tradition and culture did not detract from the fact that the first respondent is a Muslim.

- D [12] As such, the absence of any affidavit in furtherance to the three affidavits had not compromised the second respondent's case as the second respondent, through one Umami Nurul Farahin bt Kamaruddin, the guardian ad litem in the present case, had responded in her affidavit, affirmed on 11 October 2021, where she had denied the averments made in the applicant's affidavit in support, affirmed on 31 May 2021.

- F [13] In fact, the second respondent had exhibited a copy of the first respondent's birth certificate, which indicated that the first respondent was born and still is a Muslim. The discovery of this birth certificate was through the efforts of the guardian ad litem pursuant to her role in accordance with s 13 of the Adoption Act, to establish the identity of the first respondent. The provision reads:

Section 13 — Duties of guardian ad litem

- G (1) It shall be the duty of the guardian ad litem *to investigate as fully as possible all the circumstances of the child and the applicant, and all other matters relevant to the proposed adoption*, in order to safeguard the interests of the child before the Court, and, in particular, it shall be his duty to include in his investigation the following questions:

- H (a) whether the statements in the form of application required by subsection 11(1) are true and complete, *particularly as regards the date of birth and the identity of the child ...* (Emphasis added.)

- I [14] There was no reason to dispute the veracity of the birth certificate adduced by the guardian ad litem. In any event, since it was undisputed that the first respondent's mother is a Muslim, it could not be doubted that the religion of the first respondent should follow suit.

- [15] Besides s 31 of the Adoption Act as alluded to earlier, reference was

made also to the Federal Court case of *Sean O' Casey Patterson v Chan Hoong Poh & Ors* [2010] 3 MLJ 733, where it was stated by James Foong FCJ in the following passage:

... The reason why Muslims are excluded from the operation of the Adoption Act 1952 (Act 257) is obvious. *The effect of adoption under the Act is repugnant to Islamic law.* I need not elaborate on this.

... (Emphasis added.)

[16] On that basis alone, this application was dismissed. However, in the interest of completeness, I proceeded to address the subsequent issues raised by the applicant.

Whether consent of the first respondent's mother had been obtained/ dispensed with

[17] Since this application was with regard to the adoption of the first respondent, the issue at the forefront was whether s 12 of the Adoption Act had been fulfilled. The provision reads:

Section 12 — Appointment of guardian ad litem: persons to be respondents and service.

(1) Whenever an application for an adoption order is made to the Court, the Court shall appoint a *guardian ad litem* of the child in respect of whom the application is made, and upon such appointment the duplicate of the form mentioned in subsection 11(1) shall be delivered to the guardian ad litem.

(2) The following persons or bodies shall be made respondents, namely, the child in respect of whom the application is made, the guardian ad litem of the child, *every person who is a parent or guardian of the child or who is liable to contribute to the support of the child*, and, where the applicant has a spouse who is not also an applicant, the spouse of the applicant:

Provided that no person whose consent has been dispensed with in accordance with section 5 shall be made a respondent.

(3) As soon as the guardian ad litem has been appointed, the Court shall fix a time for the hearing of the application, and shall issue a notice in the prescribed form addressed to the respondents and shall cause such notice to be served on each of them:

Provided that where the child is in the actual custody of any person, such notice need not be served on the child, but may require such person to produce the child to the Court.

(4) Any notice under this Act shall be served upon any respondent to whom it is addressed either by delivering a copy to him personally, or, with leave of the Court, by sending a copy by registered post to his last known or usual place of residence, whether such place of residence is in Malaysia or elsewhere. (Emphasis added.)

[18] It is clear that s 12(2) of the Adoption Act requires the first respondent's

- A mother to be named as one of the respondents in this application, unless her consent had been dispensed with pursuant to s 5 of the Adoption Act, which reads:

Section 5 — Consents to adoptions

- B (1) *Except as provided in this section, an adoption order shall not be made except with the consent of every person or body of persons who is a parent or guardian of the child in respect of whom the application is made or who is liable to contribute to the support of the child and an adoption order shall not be made upon the application of one of two spouses without the consent of the other of them:*
- C *Provided that the Court may dispense with any consent required by this section if satisfied.*
- (a) *in the case of a parent or guardian of the child, that he has abandoned, neglected or persistently ill-treated the child;*
- D (b) *in the case of a parent or guardian of the child, that he has abandoned, neglected or persistently ill-treated the child; in the case of a person liable to contribute to the support of the child, that he has persistently neglected or refused so to contribute;*
- E (c) *in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld;* or
- (d) *in any case, that in accordance with any written law relating to the adoption of children for the time being in force in any country any competent authority has given permission or granted a licence authorizing the care and possession of the child to be transferred to the applicant.*
- F (2) The Court may dispense with the consent of the spouse of an applicant for an adoption order if satisfied that the person whose consent is to be dispensed with cannot be found or is incapable of giving such consent or that the spouses have separated and are living apart and that the separation is likely to be permanent.
- G (3) The consent of any person to the making of an adoption order in pursuance of an application (not being the consent of the child) may be given (either unconditionally or subject to conditions with respect to the religion in which the child is to be brought up) without knowing the identity of the applicant for the order; and where consent so given by any person is subsequently withdrawn on the ground only that the identity of the applicant is unknown that consent shall be deemed for the purposes of this section to be unnecessarily withheld.
- H (4) While an application for an adoption is pending in any Court, any parent or guardian of the child who has signified his consent to the making of an adoption order in pursuance of the application shall not except with the leave of the Court remove the child from the care and possession of the applicant; and in considering whether to grant or to refuse such leave the Court shall have regard to the welfare of the child. (Emphasis added.)
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[19] Reference was also made to r 7 of the Adoption Rules 1955 ('the Adoption Rules') and Form 2 of the First Schedule to the Adoption Rules, both

of which read:

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Rule 7 — Consents in writing

Every consent required under the Ordinance shall be *in accordance with Form No. 2* in the First Schedule hereto and shall be declared and signed in the presence of a Magistrate or a Commissioner for Oaths.

B

FORM NO 2
FEDERATION OF MALAYA
STATE/SETTLEMENT of
In the High Court at

C

Adoption Application No. of

In the matter of the Adoption Ordinance Act 1952
AND

D

In the matter of A.B., of a child.

CONSENT TO ADOPTION ORDER

I, the undersigned of being —

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- (a) the father of the said child;
- (b) *the mother of the said child*;
- (c) guardian of the said child;
- (d) a person having the actual custody of the said child;
- (e) a person liable to contribute to the support of the said child;
- (f) the spouse of the Applicant;

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hereby solemnly and sincerely declare that I understand the nature and effect of the adoption order for which application is made (and that in particular I understand that the effect of the order will be permanently to deprive me of my parental rights). And I hereby consent to the making of an adoption order in favour of the applicant(s).

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In witness whereof I have declared and signed this consent on the day of, at

H

.....

Signature.

Declared and signed before me:
Magistrate/Commissioner for Oaths

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(Emphasis added.)

[20] It appeared, therefore, that in filing this application, the petitioner had not complied with s 12 of the Adoption Act, as the consent of the first

A respondent's mother was never obtained, nor dispensed with by this court.

[21] It was undisputed that dispensation had not been granted by this court. However, the applicant contended that such dispensation was not a prerequisite to this application, and as such, this court was empowered to dispense with consent during the hearing of this application.

[22] Based on the reading of the relevant provisions, I was unable to agree with the applicant, as she should have obtained dispensation as stipulated by s 12 of the Adoption Act, prior to the filing of this application.

[23] At this juncture, it was important to impress upon parties that adoption is a legal fiction — a legal fiction being a fact, although not true, but is assumed for the advancement of justice, and one which the law will not allow to be rebutted. As such, it was crucial to ensure that all requirements for an adoption application are fulfilled.

The most important consideration in applications for adoption

E [24] The applicant further submitted that obtaining consent from the biological parents of the first respondent should not be the priority of this court, as it was the welfare of the child that was the paramount consideration, when dealing with an application for adoption.

F [25] I was of the view that this argument was flawed. It is trite law that the welfare of the child was of the paramount consideration when addressing the issue of custody, care and control. In cases of adoption however, although the welfare of the child was one of the factors, it was not the most important consideration for the court.

G [26] I found instructive the cases of *TPC v ABU & Anor* [1983] 2 MLJ 79 and *Re Baby M (an infant) (adoption: consent)* [1994] 2 MLJ 635, where in both cases, the court had emphasised the significance of obtaining the consent of the biological parents in applications for adoption. In the former case, it was stated by Edgar Joseph Jr J (as he then was) in the following passage:

I Before the sessions court, both parties were represented, and based entirely on affidavit evidence, the President approved the application for adoption being guided by the principle that the paramount and overriding consideration was the welfare of the child. With respect, this is not the correct approach. *Welfare is not the paramount and overriding consideration as it is in wardship, guardianship or custody proceedings: (Re H a Minor* [1982] 3 All ER 84, 92 Paramount consideration in this context means consideration outweighing *all* others. However, in adoption applications, welfare of the child is certainly the consideration that outweighs *any*

other: (per Lord Simon in *Re D (an Infant) (Parent's Consent)* [1977] 1 All ER 145, 150, 160. (Emphasis added.)

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[27] Consent, being the most important factor in applications for adoption, is also indicated in s 6 of the Adoption Act, which lists the factors that this court must be satisfied with, before allowing an application for adoption. The provision reads:

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Section 6 — Matters with respect to which Court to be satisfied

The Court before making an adoption order shall be satisfied —

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- (a) *that every person whose consent is necessary* under this Act, and whose consent is not dispensed with, has consented to and understands the nature and effect of the adoption order of which application is made, and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights;
- (b) that the order if made will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child, having regard to the age and understanding of the child;
- (c) that neither the applicant nor the parent or guardian has received or agreed to receive, and that no person has made or given, or agreed to make or give to the applicant or the parent or the guardian any payment or other reward in consideration of the adoption except such as the Court may sanction; and
- (d) that there has been a substantial change in the circumstances, if it appears that the applicant has made a previous application under this Act in respect of the same child. (Emphasis added.)

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[28] This is fortified by the view expressed by Edgar Joseph Jr J (as he then was) in *TPC v ABU & Anor*, in the following passage:

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In section 6 of the Act it is placed second of three matters which the Court has to be satisfied about before making an adoption order. The first being that every person whose consent is necessary and whose consent is not dispensed with has consented and the third being that neither the applicant nor the parent or guardian has received or any other person made or given or agreed to make or give the applicant any payment or reward in consideration of the adoption. (Emphasis added.)

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[29] In the present case, the applicant claimed that it was unreasonable to expect her to have obtained the consent of the first respondent's mother since she alleged that it had been 20 years since she had last heard from her.

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[30] In my view, the burden was upon the applicant to convince this court that it was justified for consent to be dispensed with, and in doing so, that she had made all reasonable efforts to locate the first respondent's mother. After all,

- A the first respondent's mother was the domestic help of the applicant. Furthermore, if the first respondent had been abandoned shortly after he was born, which was about 20 years prior to the filing of this application, then it begs the question why the applicant had chosen to file this application only now, and then to have conveniently claimed that she was unable to locate the first respondent's mother.
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- [31] If fact, no evidence at all was adduced by the applicant to convince this court that she had even made any effort to locate the first respondent's mother, other than to merely state that she did not know where the first respondent's mother was.
- C

[32] In the final analysis, I was unconvinced by the applicant's arguments.

D CONCLUSION

- [33] In the upshot, based on the aforesaid reasons, and after careful scrutiny of all the evidence before this court, both oral and documentary, and submissions of both parties, this application was dismissed for the following reasons:
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- (a) that the first respondent is a Muslim and as such, the Adoption Act did not apply;
- (b) even if the Adoption Act did apply, the applicant had not complied with the procedure in s 12 of the Adoption Act; and
- F
- (c) that the consent of the first respondent's mother, being the most important factor in an application for adoption, had neither been dispensed with nor obtained.

- G *Adoption application dismissed.*

Reported by Ashok Kumar

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I